IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WORTHEN LUMBER MILLS,
Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
Appellee.

No. 2640.

Supplemental Petition for Rehearing on Behalf of Appellant.

METSON, DREW & MACKENZIE, and
HORATIO ALLING,
Of Counsel for Appellant.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co.,
San Francisco

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SUPPLEMENTAL PETITION FOR REHEARING ON BEHALF OF APPELLANT.

Having been retained in this matter subsequent to the decision herein of February 7, 1916, the undersigned beg leave to present this Supplemental Petition for Rehearing on behalf of appellant.

There will be no attempt herein to reopen the general discussion of the points raised on brief and considered and passed upon by the Court. There are two propositions, however, of such seeming weight and consequence as to be entitled to the most serious consideration by the Court before the judgment below shall be finally affirmed. They are

First. The right to wharf out over tide lands to deep water does not inhere in the littoral right of

access, but *must rest in grant* from the tide land owner, and no such grant was shown.

Second. The right of access shown was *to a public use* and any obstruction of such *use* may be redressed only at public suit.

If these two propositions are sustained by the facts and warranted by the law, it must follow that no private right of appellee's was shown to have been either violated or threatened, and the judgment of the lower court awarding an injunction should be reversed.

I.

The right to wharf out over tide lands to deep water does not inhere in the littoral right of access, but must rest in grant from the tide land owner, and no such grant was shown.

The title to the tide lands below mean high-water, in front of the premises in question, is in the Government. The right to wharf out over these tide lands to deep water would constitute a servitude in favor of the upland owner. The point made is that that servitude right does not inhere in the upland ownership, but, where it exists must rest in grant from the Government.

This was expressly held in *Shively* v. *Bowlby,* 152 U. S., 1, 38 L. ed., 331, and in *Scranton* v. *Wheeler,* 179 U. S., 141, 45 L. ed., 126. In the first case the

question was most elaborately and exhaustively discussed, the earlier Federal cases reviewed and distinguished and the holdings of the various State courts examined and considered. Beyond question it must be said to be the leading case upon this subject.

In that case (*Shively* v. *Bowlby*), the Supreme Court of Oregon decided first, that a grantee of the United States of lands bounded by tidal navigable waters obtained by virtue of such grant no exclusive access to deep water, *and no wharfage rights* below ordinary high tide in front of said high land; second, that the State of Oregon was the absolute owner of all rights in front of the high land granted by the United States to said grantee below the meander line to deep water, to the exclusion of any and all rights of said grantee under his grant from the Government; and third, that the State of Oregon had the absolute power to dispose of said tide lands and all wharfage rights in front of the high land. This judgment by the Supreme Court of Oregon was affirmed by the Supreme Court of the United States in the case cited. After a most thorough and extended discussion of the subject and the authorities, Mr. Justice Gray says:

> "The conclusions from the considerations and authorities above stated may be summed up as follows:
>
> "Lands under tide water are incapable of cultivation and improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by indi-

viduals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people. . . .

"Upon the acquisition of a territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory. . . .

"The United States while they hold the country as a territory, having all the powers both of national and municipal government, *may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters.* . . .

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, *no title or right below high water mark,* and do not impair the title and dominion of the future State when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States."

It is then held that the upland grant by the United States included no title or right in the land below high water mark. The right to wharf out to deep water was in issue and had been denied by the judgment of the Oregon court and that judgment was affirmed.

The holding in *Shively* v. *Bowlby* was followed by this Court in *Columbia Canning Co.* v. *Hampton,*

161 Fed., 61, and attention called to the fact that by Federal Statute (Act Cong. May 14, 1898, C. 299, 30 Stat., 409, U. S. Comp. St., 1901, p. 1412), extending the homestead laws to the District of Alaska, a clear Congressional recognition of the principle may be discovered, in that it is therein specifically provided in Section 1, that nothing therein contained should "be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district."

It was held in that case that the upland owner's littoral access right did not invest him with the right to build a fish trap upon the tide lands in front of his premises, and in support of that holding the concluding paragraph of the opinion in *Shively* v. *Bowlby,* above set out, was approvingly quoted.

From that case and the other authorities considered, Judge Morrow concludes that

> "While the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high-water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark."

That case was followed in *Decker* v. *Pacific Coast S. S. Co.,* 164 Fed., 974, where the rule of *Shively*

v. *Bowlby,* was again invoked. In that case the upland owner complained that her right to wharf out was interfered with and obstructed by a wharf structure to deep water beginning at a point below mean high water. Here the question was squarely presented as to whether there inheres in a littoral right of access a vested right to wharf out; in other words, whether the intervening tide lands are burdened with an exclusive easement in favor of the upland owner.

As to that this Court remarks that while a littoral owner's right of access to deep water is unquestioned,

> "It cannot be ascertained from the allegations of the complaint in this case, nor does it appear in evidence, in what manner the maintenance of the buildings and wharf by the appellee in front of appellant's premises prevents her from having access to the navigable waters of Gastineau Channel. The presumption is that such access would be facilitated, rather than obstructed, by the maintenance of a wharf or other suitable structures for the accommodation of the public."

It was there held that the littoral right of access carries and includes no exclusive easement right over tide lands.

The principle announced in *Shively* v. *Bowlby* again finds recognition by this Court in *McCloskey* v. *Pacific Coast,* 160 Fed., 794, but the case there turned upon the question as to whether plaintiff was a littoral owner.

The subject was again considered by this Court in

Dalton v. *Hazelet,* 182 Fed., 561, and the rule of *Shively* v. *Bowlby* was again approvingly quoted. But in that case it was nevertheless held that the littoral owner's right of access included the right to wharf out over the tide lands to deep water. This conclusion seems so illogical in view of the premise adopted from *Shively* v. *Bowlby,* that we trust the Court will indulge a serious attempt to demonstrate its erroneousness. Judge Morrow reaches the conclusion thus:

> "We think that, under the facts stated, the plaintiff is entitled to be relieved against this obstruction; that, while in a territory a grant of land bordering on or bounded by navigable waters conveys to the grantee no right or title to the shore or soil below high-water mark, nevertheless such a grantee has the right to a free and unobstructed access to such waters. 1 *Farnham on Waters,* 297. *But how shall the littoral owner have access to navigable waters where shoal water intervenes?"*

In answering that question this Court concludes that the right to wharf out must be said and held to inhere in the littoral access right to the end that such latter right may be rendered effective. From which it must follow that the intervening tide land is burdened with that servitude and the upland grant must be said to include that burden. It is submitted that the answer is forced to match the *assumption* that the littoral right of access would otherwise be ineffective. If the right to wharf out over government owned tide

lands inheres in upland ownership, then it cannot be true as held in this same case, that "a grant of land "bordering on and bounded by navigable waters con- "veys to the grantee *no right* or title to the shore "or soil below high-water mark," for if the right to wharf out inheres in the littoral access right, then the littoral owner enjoys a servitude in and over such tide lands, and that against the whole world, the Government included. It is submitted that the conclusion does not square with the premise.

Nor is the answer given by Judge Morrow to his self-propounded question necessary to the full effectiveness of the littoral access right. Where effective access to the navigable waters in front of an upland owner's premises requires a wharfing privilege, it should be sought and obtained from the owner of the tide lands to be crossed and upon which the wharf must be constructed and maintained. How otherwise can such a servitude be lawfully fastened upon the land of another?

The true answer to Judge Morrow's question is to be found in the Federal Statute (6 *Fed. Stat. Ann.*, 813, 30 Stat. L., 1151), where it is provided that wharfing privileges over Government tide lands may be obtained through the Secretary of War. This statute is yet another evidence of Congressional recognition of the unburdened character of the Government's ownership of its tide lands. It is there provided that a wharf may be constructed in a situation

like this only on plans recommended by the Chief of Engineers and after being duly authorized by the Secretary of War. Any other wharf construction upon Government tide lands is declared to be unlawful and expressly prohibited.

The answer to Judge Morrow's question which this Court adopted is based on the authority of a certain passage in the opinion of Mr. Justice Clifford in *Dutton* v. *Strong,* 66 U. S., 1, 17 L. ed., 29. This very passage, together with subsequent comments thereon by Mr. Justice Clifford in *St. Paul* v. *Schurmeier,* 66 U. S., 23, and Mr. Justice Miller in *Yates* v. *Milwaukee,* 77 U. S., 497, were considered, analyzed and distinguished in *Shively* v. *Bowlby,* and it was there held that the language employed in those cases, while not inaccurately stating the law as applied the facts there involved, afforded no warrant for the contention that the sovereign ownership of tide lands is in any wise burdened by an implied wharfing servitude in favor of the upland owner, and that the right to wharf out over such tide lands was subject to the grant and regulation of the sovereign owner.

This holding was followed by Mr. Justice Harlan in *Scranton* v. *Wheeler,* 179 U. S., 141, 45 L. ed., 126, where it was held that an upland owner was without cause of complaint on account of a Government pier constructed at deep water, although by reason of there being no connection with his upland, his littoral right of access was thereby cut off, and although he had

been awarded no compensation. Here again the cases of *Dutton* v. *Strong* and *Yates* v. *Milwaukee* were sharply distinguished and the passages above referred to held to be no more than *dicta.* In the Scranton case the cutting off of the littoral access right was justified upon the grounds that the pier was constructed by Government authority, upon Government shore lands and in the furtherance of public interests. Could it have been so held if it was considered that any easement right of wharfing out in furtherance of littoral access inhered in the upland ownership?

In that case it was held that there was no such right in the littoral owner as to entitle him to ejectment nor yet to compensation. This is a clear rejection and reversal of the passage in the Yates case which Mr. Justice Harlan denominates as dictum, to the effect that the right to wharf out in furtherance of a littoral right of access is property and once vested can only be taken from the owner in accordance with established law, and if necessary to be taken for public good, upon due compensation.

Furthermore, between the Dalton case and this case there is this dissimilarity in the findings. In the Dalton case the lower court found that the defendant's structure cut off plaintiff's littoral right of access to deep water. The finding was general and referred to the right of access as such, and in no way limited the right found to be thus cut off to the right of the upland owner to wharf out to deep water. In this

case, having found (Finding V, p. 45, Trans.) that appellee was building a large milling plant upon the upland and in furtherance of its construction and subsequent operation required access to deep water and that to serve that end it was necessary to build a wharf covering the entire 400 foot strip of tide lands in question, the court further found (Finding VIII, p. 49, Trans.) that if appellant completed the structure complained of it would "prevent the building of the wharf aforesaid, *and thus* cut off plaintiff's access to deep water." Evidently the only littoral right claimed and found here is the right to wharf out. That is entirely another thing from a littoral right of access, flowing from a different source and fructifying in a different use.

It is perfectly manifest that the granting of a right to wharf out over Government tide lands under the Federal Statute (6 *Fed. Stat. Ann.,* 813, 30 Stat. L., 1151) is made a matter of governmental discretion. The Secretary of War in this behalf acts for the Government which is the owner of the soil upon which the wharf must be constructed. It will not be disputed that that soil with the overlying waters has been by the sovereign devoted to public highway uses.

There is to be found no renouncement of or departure from such devotement in the policy represented by the ordained statutory method of granting wharfing privileges to littoral owners. The discretionary grant of such rights is clearly intended not only

to conserve the interests of the public but to enlarge the benefits the public may derive.

Wharfing rights are granted or denied by the Government in the interest of commerce and navigation. Clearly an enlarged public benefit as against that of the ordinary uses of such tide lands, is the *sine qua non* of a governmental grant of right to wharf out. That alone will justify the abridgement of the public use by the bestowal of an exclusive private right upon the upland owner. But it should be clear that it is this assumed public advantage from the proposed improvement rather than any recognied vested right in the upland owner that is intended to appeal to and control the governmental discretion and actuate in any given case a grant of wharfing rights.

The only right which the Government recognizes in the upland owner to wharf out, is the right to get a right if he can and does make a showing of probable enlarged public benefit resulting from the proposed improvement. It is the nature of that showing rather than the dignity of his standing as an upland owner that influences the governmental discretion.

Exclusive private rights are granted to the upland owner in such case evidently for the double reason, (1) because the upland owner's littoral right affords a natural outlet to the wharfing use, and (2) because such private use right over the tide lands crossed is essential to the private investment necessary to the improvement. These, however, are but secondary

considerations which are not even reached until the controlling consideration, i. e. that the proposed improvement will be a public benefit, has been affirmatively determined.

It thus appears, that as to wharfing out to deep water over this 400 foot strip of beach, the only present right appellee is shown to have is the right to get a right—or rather the right to try to get a right. The record is silent as to any right to wharf out having been secured by appellee. There is no hint of an application having been made to the appropriate governmental department looking to the securing of such right. There is nothing to show that plans for wharf improvements covering this entire 400 foot strip of beach, have been either prepared, or recommended by the Chief of Engineers, or authorized by the Secretary of War. There is nothing shown or found save appellee's desires in that regard. It is not even shown and found that it is appellee's intention to secure the right to wharf out.

Where then is the foundation for the injunctive relief awarded by the lower court? What is the present right in the appellee that has been either violated or threatened by the acts complained of? There can be no damage or injury either sustained or threatened such as will warrant injunction where no present right in plaintiff is shown.

Clearly no showing of intention merely will suffice. That would be true if the right to get a wharfing

privilege were absolute, and how much more where it is so clearly contingent, for *non constat* the Chief of Engineers may refuse to recommend the plan submitted, or the Secretary of War may refuse to authorize the project. As well might appellee ask for an injunction with no claim or showing of upland ownership, upon a mere profession of a desire to acquire the upland and an intention to do so if the present owner will consent to sell it at a reasonable price.

II.

The right of access shown was to a public use and any obstruction of such use may be redressed only at public suit.

The littoral right of access, considered as a private right, is no more than the right to come and go across the line that divides the shore land from the upland. That private right unquestionably inheres in the upland ownership. The private right of access, however, is an entirely different thing from the *use right* to which such access right admits the upland owner.

The waters of Gastineau Channel together with the tide lands that underlie them are a public highway. The title to the underlying tide lands is in the Government. Both the waters and the shore lands below mean high water, are by our laws devoted to public use. The character of that use is as varied as the vo-

cations and pleasures of the people for whose benefit the use has been created.

Navigability is a relative term. Waters and stages of water are navigable for a small launch or sailing vessel that would not be navigable for an ocean steamer. The public use rights of waters and beach include landing rights for craft of all kinds at all stages of water. Such landing rights include in turn the right to use the beach for passage between water and upland. At the line of mean high water this right of passage will be cut off by the private rights of the upland owner. But the public right of passage being along as well as across the beach, would allow any outlet to the upland not so abstracted.

It is to this general public use, then, that the littoral right of access admits the upland owner. His right would seem to be equivalent to that of an owner of property abutting on a public street, namely, the right of access to a public use. An obstruction of the street would not warrant a private action by such owner unless it was of such a character as to affect his access to the public use.

It has been expressly found by the lower court and held by this Court that the construction and maintenance of Franklin Street in front of this property did not affect appellee's right of access or amount to an obstruction of which appellee could be heard to complain. Why? Because, first, as a matter of fact and law it was a public use of that which was sub-

ject to such use, and second, it did not as a matter of fact obstruct appellee's access to such use.

In this view, the platforms built by appellant along the seaward side of Franklin Street cannot be said to interfere with appellee's right of access to the public use. The only effect of such platforms must be to limit and obstruct such public use, but as to that the public alone has the right to complain. If it is the *use* that is here obstructed and not appellee's right to be admitted to that use, then clearly the wrong may not be redressed at appellee's suit.

Counsel for appellee have throughout indulged the assumption, which the lower court seems to have shared, that the upland owner by virtue of his admitted right of access, has some sort of exclusive right to the use of the waters and beach in front of his premises; some right of use that is superior to the public right arising out of the highway uses to which by law such waters and beach have been devoted.

This obscuring thought of exclusive use rights arises, doubtless, from an unthinking assumption that the littoral access right is exclusive; that no one but the upland owner enjoys a right of access to the beach in front of his premises. But his right of access is exclusive only as to its being littoral. Actual access to the beach and water in front of his premises is open to the public generally on three sides.

Furthermore, in this case, the public enjoys full, free and actual access to the water and beach in front

of appellee's premises from both sides of Franklin Street. Here we have a street highway superimposed upon the water-beach highway, and their public uses mingling, there is no room for any exclusive use right in the upland owner. He cannot be accorded exclusive use rights for the double reason, (1) his right of access though littorally exclusive does not afford an exclusive admission to the uses, and (2) the uses are public highway uses.

The right to wharf out would be an exclusive private use, but, as we have seen, that right is the subject of specific grant from the tide land owner and does not inhere in the littoral right of access. Apart from that, what possible use rights can appellee be said to have in the waters and beach in front of these premises save those general highway rights which it shares with the public? If it must be said and held that appellee's littoral right of access implies no more than its right to an unobstructed admission to those general public uses, then this action must fail, for it sufficiently appears that the only effect of the platform complained of must be to limit and obstruct uses that are essentially and solely public.

It is therefore submitted that the judgment of the lower court should be reversed for the reason that the injunction was not warranted

First. Because appellee has no wharfing rights to be obstructed, and

Second. The obstruction complained of can only affect public uses, and can in no way affect appellee's littoral right to be admitted to those uses.

Respectfully submitted.

METSON, DREW &
MACKENZIE, and
HORATIO ALLING,
Of Counsel for Appellant.

THIS IS TO CERTIFY that in my judgment the foregoing Supplemental Petition for Rehearing is well-founded and it is not interposed for delay.

HORATIO ALLING,
Of Counsel for Appellant.